

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LUIS ANTONIO CABALLERO,
Petitioner.

No. 2 CA-CR 2015-0191-PR
Filed September 18, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
Nos. CR20080785001, CR20080904001, CR20084119001, and
CR20091306001
The Honorable D. Douglas Metcalf, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Luis Antonio Caballero, Tucson
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner Luis Caballero seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Caballero has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement related to four different cases, Caballero was convicted in 2009 of possession of a narcotic drug, possession of a narcotic drug for sale, and three counts of aggravated assault. The trial court sentenced him to concurrent and consecutive prison terms totaling 26.75 years.

¶3 Caballero thereafter initiated Rule 32 proceedings. In the first, he raised a claim of ineffective assistance of trial counsel. After an evidentiary hearing, the trial court denied relief in February 2014. In a second proceeding, he raised a claim of ineffective assistance of Rule 32 counsel. The trial court denied relief in August 2014, and Caballero filed a petition for review in this court challenging the trial court's rulings in both proceedings. Because his petition was untimely as to the first proceeding, we granted review only to consider the ruling in the second one. *State v. Caballero*, No. 2 CA-CR 2014-0311-PR ¶ 7 (memorandum decision filed Feb. 25, 2015). We denied relief, *id.* ¶ 9, but noted in our decision that Rule 32.9 allowed Caballero to seek permission in the trial court to file a delayed petition for review as to the ruling in the first proceeding, *id.* n.5. While that petition for review was pending, Caballero filed a third notice of post-conviction relief, alleging a conflict of interest

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based on the prosecutor having worked for the trial judge as a law clerk. The trial court dismissed that notice on January 15, 2015.

¶4 In March 2015, Caballero filed a motion “to comply with appellate decision,” urging the trial court to allow him a delayed petition for review as to both the first and third proceedings. The court granted a delayed petition as to the first proceeding, but denied it as to the third.

¶5 On review, Caballero first repeats the claims made in his third proceeding relating to the prosecutor and former law clerk. Caballero’s petition, filed in June 2015, is untimely as to the ruling in that petition, *see* Rule 32.9(c), and the trial court denied his motion for a delayed petition for review as to that proceeding. We therefore do not consider that claim.

¶6 In his primary argument, Caballero argues, as he did below, that trial counsel was ineffective in relation to his guilty plea because counsel had misinformed him as to whether his sentences would run concurrently or consecutively. And he maintains counsel should have retained a mitigation specialist.¹

¶7 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency

¹Caballero also argues trial counsel was ineffective because he did not challenge the state’s proof he had committed aggravated assault based on his use of a belt and buckle as a weapon. Caballero did not raise this argument below, but in any event by entering the plea he waived all nonjurisdictional defenses, errors, and defects that occurred prior to the plea proceedings. *See State v. Canaday*, 116 Ariz. 296, 296, 569 P.2d 238, 238 (1977). This principle applies to claims of ineffective assistance of counsel, except those that relate to the validity of the plea. *State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). Caballero has not established that such is the case here. *Cf. In re Pima Cty. Juv. Action No. 97036-02*, 164 Ariz. 306, 312, 792 P.2d 769, 775 (App. 1990) (concluding belt was dangerous instrument under circumstances used).

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prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). After a hearing on such a claim, our review of the court’s factual findings “is limited to a determination of whether those findings are clearly erroneous”; we “view the facts in the light most favorable to sustaining the lower court’s ruling, and we must resolve all reasonable inferences against the defendant.” *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When “the trial court’s ruling is based on substantial evidence, this court will affirm.” *Id.* And, “[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence.” *Id.*; *see also State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding).

¶8 In this case, the trial court rejected Caballero’s testimony as not credible, finding it “contradict[ed] statements he made at his change-of-plea hearing.” In contrast, the court found Caballero’s attorney’s testimony credible and consistent with the plea colloquy held before the court. The court also concluded Caballero had not established prejudice because nothing suggested the sentencing judge “would have sentenced him any differently” had the additional mitigation evidence Caballero now urges been presented.

¶9 Caballero’s argument on review essentially amounts to a request that this court reweigh the evidence presented at the hearing. But, we do not reweigh evidence; the trial court was “the sole arbit[er] of the credibility of witnesses” at the evidentiary hearing. *Fritz*, 157 Ariz. at 141, 755 P.2d at 446; *see also Sasak*, 178 Ariz. at 186, 871 P.2d at 733 (“It is the duty of the trial court to resolve any conflicts in the evidence.”). And the court’s factual determinations were supported by the record and evidence presented. We therefore affirm the court’s ruling.

¶10 For these reasons, although we grant the petition for review, we deny relief.